

1. The agreement is expressly governed by English law.  
Applying the English laws of construction of written  
agreements we analyse the effect of clause 18 as follows.

2. (a) First we need to decide the meaning of "management role". Management in relation to a UK company is usually understood to be the conduct of the business of the company within the policy laid down from time to time by the Board. Carrying out a management role is distinct from carrying out functions which are derived from proprietorship rights. These rights include the right to appoint directors and therefore to decide on the people who will decide the policy for running the company; the right to decide what business the company carries on; the right to determine the constitution and capital of the company and the right to wind up the company.

(b) The role mentioned in clause 18 is limited in two ways: first it is to be the same role as that "hitherto performed" and second it is to be that role hitherto performed "insofar as it affects the business of RI". RI here means what it says and does not mean RI and its subsidiaries. The latter expression is used in a number of places in the document. Had it been intended to use that expression in clause 18 it could have been used. The business of RI is that of a holding company managing its investments and advising its subsidiaries. If, before 22nd April, 1981 Rembrandt performed a management role in relation to any one or

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more subsidiaries of RI that role is not covered by in clause 18 unless Rembrandt can show that it was the intention to cover it. This will be difficult unless Rembrandt can show that there were direct agreements between subsidiaries, such as, say, Brinkmann, providing that Rembrandt "managed" some aspect of their business.

(c) The second sentence of clause 18 does not upset what is stated above. It is merely a statement that if the two named conditions are fulfilled the parties may agree to alter their arrangements. The word "may" is used instead of the word "shall". The sentence is permissive and not mandatory and adds nothing to the parties obligations. The expression "the role of managing partner" must mean the same as the "management role" referred to in the first sentence. To interpret it otherwise puts an unnecessary conflict into clause 18. Also the expression is found neither in the partnership document nor elsewhere in the documents. It must have a meaning distinct from the expression "controlling partner" which is what one partner becomes when the principle of equal partnership no longer applies (see 3(e) of the 23rd May, 1981 supplemental agreement). The implication must be that "the management role" and "role of managing partner are lesser roles than that of "controlling partner".

(d) The fact that clause 18 refers to "partners" supports the view that it must be construed in the context of the partnership principal. This is reinforced by clause 3(e) of the Supplemental Agreement dated 23rd May, 1981. The documents show

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an intention that there should be equality between them insofar as concerns important matters of policy relating to the RTH group. This is reflected in clause 17 of the 22nd April, 1981 agreement and in the partnership documents. These deal more with how the rights and influences of Rembrandt and Philip Morris as proprietors are to be given effect to, and provide how control is to be exercised since there is no controlling partner until the RTH 50/50 deadlock is altered.

There is then, built into the arrangements, a distinction between the channels by which policy towards the RI group is formulated and the management role which ought to reflect that policy if it co-incides with the policy of the RI board itself..

(e) Although the RI board can be appointed by RTH it must, once appointed, act in the interests of all shareholders. Thus if RTH were in exercising its rights as a proprietor, to suggest a policy which the Board considered was not in the interests of all shareholders, its duty is not to adopt it, even at the risk of being replaced. Because of this duty it cannot, as a Board abandon its management functions, or any of them. It can only delegate them on terms that whoever they are delegated to carries them out in a way which does not conflict with the Board's policy. Hence if Philip Morris and Rembrandt and the Board of Rothmans International agree on policy there will be no conflict between the management role and the proprietorship role. If Philip Morris and Rembrandt disagree on policy, there will be a deadlock in RTH leaving the Board of Rothmans International to make its own policy and to see that any manager, or adviser, it uses carries it out.

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(f) The conclusion is that there is a distinction in the documents between the "proprietorship" or "partnership" role and the "management" role and that the latter is subordinate to the former. What Rembrandt has secured by clause 18 is the right to continue to carry out the functions vis-a-vis RI which it previously carried out so as to ensure that the policy of RI, whether agreed by RTH or determined by the Board of RI alone is implemented. Rembrandt has not secured by the clause the right to determine policy or the unfettered right to manage.

(g) If Philip Morris were to acquire all the shares of RI other than those held by RTH and RTH were to continue to be owned as at present, Rembrandt would still have a right to carry out its management role but it would have to do this within the policies laid down by the Board of RI and so as to give effect to this policy. Since therefore Philip Morris would be able to determine the composition of the Board of RI (whether or not the RTH shares were voted) Philip Morris would determine the policy of RI. If the entity performing the management role does not carry out these policies then it will be in breach of its duties as a manager and the arrangement for managing can be terminated without compensation.

(h) Philip Morris has asked whether Rembrandt could obtain injunctive relief to enforce its rights under clause 18. Since English law is the proper law of the contract the English courts have jurisdiction. The granting of injunctive relief is entirely

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within the discretion of the court and the court considers whether damages would be an adequate alternate remedy to an injunction. Rembrandt's action would essentially be one against Philip Morris to procure that Philip Morris exercises its rights vis-a-vis RI (via RTH) so as to secure that RI continues to engage Rembrandt as a manager. In our view the chances of injunctive relief being awarded are remote both as regards likelihood and in time for the following reasons:

(i) for injunctive relief to be granted the court has to be satisfied that the rights of the parties are clear and that these rights can only properly be protected by an injunction of some kind rather than damages. Since Rembrandt can only manage within the bounds of policy agreed by RTH and RI, or determined by RI alone, it is performing a service function only. It will have obligations to carry out what it is required to do and it will be paid for its services. This is the extent of its rights and a breach of those rights can adequately be compensated by damages.

(ii) we believe a court would take the view that it was the duty of RI to see that its affairs were managed in a manner which was in the best interests of the shareholders. If the board were to force upon RI management by Rembrandt the court would itself be exercising the duties of the board of RI which we consider it would be reluctant to do unless the board of RI were in disarray or unable to function for some reason. In such a case it would be more appropriate for the court to appoint a receiver and manager of the business of RI rather

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than impose upon RI management by one of two warring shareholders.

(iii) because the whole question of the relationship the partners in RTH is extremely complex and the documentation difficult we think that the court would not even consider granting an injunction until the whole question of the relative rights of the parties had been fully established in litigation which would be lengthy and which would be certain to go to appeal.

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